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No. 02-1302

In the
Supreme Court of The United States

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG
Petitioner,
v.

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; and WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

Brief in Opposition on Behalf of Respondent, William L. LIBRERA, Commissioner of Education

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21 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

1. The Third Circuit Court of Appeals properly applied Holt in holding that the one person, one vote principle is not applicable where one school district enters into a contract (the sending district) to send its high school students across geographic boundaries to another school district (the receiving district) for educational services for these students and there are no conflicts or exceptional circumstances presented in this case.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....ii

COUNTERSTATEMENT OF THE CASE 1

I. Introduction.....1

II. Procedural Background 4

ARGUMENT

THE THIRD CIRCUIT PROPERLY APPLIED THE HOLT CASE

A. There Is No Conflict Between Holt And Branchburg, As They Both Involved A Recognition That Valid Geography-Based Restrictions On Voting Do Not Offend The Principle Of One Person, One Vote.....7

B. There Is No Recurring Question Of Exceptional Importance In This Case.....14

CONCLUSION.....16

TABLE OF CITATIONS

CASES CITED

Baker v. Carr, 369 U.S. 186 (1962).....8

The Board of Education of the Township of Branchburg v. David Livingston, et al, Civil Action No.98-557 (September 7, 2000).....*passim*

English v. Board of Ed. Of the Town of Boonton, et al., 135 F. Supp. 2d 588 (D.N.J. 2001), rev'd, 301 F. 3d 69 (2002), *cert. denied*, 123 S. Ct. 852 (2003).....*passim*

Evans v. Cornman, 398 U.S. 419(1970).....12

First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968).....7

Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970).....8

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).....*passim*

Jefferson v. Hackney, 406 U.S. 535 (1972).....9

Little Thunder v. South Dakota, 518 F. 2d 1253 (8th Cir. 1975).....8

Mixon v. Ohio, 193 F. 3d 389(6th Cir. 1999) 10

Reynolds v. Sims, 377 U.S. 533 (1964).....8

Romer v. Evans, 517 U.S. 620, 632 (1996).....9

NEW JERSEY STATUTES CITED

N.J.S.A. 18A:38-8.2.....1, 2, 3

N.J.S.A. 18A:38-1.....1

N.J.S.A. 18A:38-19.....2

N.J.S.A. 18A:38-13.....2, 3

NEW JERSEY REGULATIONS CITED

N.J.A.C.. 6A:23-3.1.....6

UNITED STATES STATUTE CITED

28 U.S.C. §1254(l) 7

RULES CITED

Fed. R. Civ. P. 12(b)(6).....4

N.J. Rules of App. P 2:2-3(2).....4

COUNTERSTATEMENT OF THE CASE

I. Introduction

The instant matter involves the boards of education of two public school districts, Branchburg and Somerville , which are engaged in a send-receive relationship. Pursuant to this relationship, Branchburg has a contract with Somerville to send its high school students to Somerville High School for instruction. In return, Branchburg pays tuition to Somerville. This relationship was voluntarily entered into by the two school districts in 1956. Pursuant to N.J.S.A. 18A:38-13, a district my petition to sever the relationship. The petitioner in this case has not sought to sever the relationship since 1979. Pursuant to State law, Branchburg is permitted to have one representative on the Somerville Board of Education to vote on high school issues. N.J.S.A. 18A:38-8.2.

The petitioner in this action is the Branchburg Board of Education.* Petitioner seeks to have N.J.S.A. 18A:38-8.2 declared unconstitutional, "as applied" on the ground that Branchburg residents are being deprived of adequate representation on the Somerville Board of Education for high school issues in violation of the federal constitutional principle of "one person, one vote." Branchburg students constitute 53 percent of the Somerville High School population and Branchburg's population as a whole amounts to more than 50 percent of the combined populations of the towns.

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*The Kovacs Plaintiffs sought the right to vote on the Somerville school budget and referenda. Their argument was rejected by the District Court as well as the Third Circuit Court of Appeals and they did not petition this Court for Certiorari.

The New Jersey Legislature requires public school districts to educate all students domiciled within their district. N.J.S.A. 18A:38-1. Pursuant to this authority, districts without high schools may choose to contract with schools outside of their boundaries for its students to attend instead of building a high school within its district to provide educational services to its students. The "consent" of the school district receiving these students (the receiving district) is an essential component of this relationship. If both districts agree to enter into a send-receive relationship, the sending district must pay tuition to the receiving school district for each student sent. N.J.S.A. 18A:38-19. The statute further provides for limited representation by the sending district on the receiving district's board of education.

Pursuant to N.J.S.A. 18A:38-8.2:

> A school district which is sending pupils to another school district pursuant to N.J.S.A. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> a.(1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the

> sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

Once a send-receive relationship is established, it may be terminated pursuant to N.J.S.A. 18A:38-13. This statute, which was enacted in substantially the same form in 1933, but amended in 1944, 1956, 1967 and 1986, provides that before the relationship may be severed, a feasibility study as to whether severance will be allowed must be conducted and submitted to the Commissioner of the Department of Education who will

> make equitable determinations based upon consideration of all the circumstances, including educational and financial implications for the affected district, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population for the districts. N.J.S.A. 18A:38-13.

It is important to note, that Branchburg has not sought severance since 1979, and currently has no severance petition pending. 14a. Furthermore, the feasibility studies which petitioner relies upon did not examine the current ability to sever the send-receive relationship. 15a. Rather they looked at the feasability of a regional or limited purpose regional school district. N.J.S.A. 18A:38-13. If a recent severance application had been submitted, an administrative process would have been instituted. As described above, this process includes the submission of a feasibility study, and a determination by the Commissioner as to whether severance is allowable. Upon a determination by the Commissioner, petitioner would have appeal rights to the State Board of

Education and ultimately to the New Jersey Appellate Division and Supreme Court. N.J.S.A. 18A:38-13. N.J. Rules of App. P. 2:2-3(2).

Petitioner argues, in essence, that parents are required by state law to send their children to school in a neighboring school district. Such a statement is inaccurate particularly in light of the fact that petitioner has not sought to sever the relationship for 23 years. Additionally, petitioner fails to mention that other options are available to parents such as private school or home schooling.

II. Procedural History

Instead of seeking severance through an administrative process, the petitioner filed a complaint in New Jersey District Court on or about December 8, 1998 seeking to have N.J.S.A. 18A:38-8.2 declared unconstitutional, "as applied," on the ground that Branchburg residents are being deprived of adequate representation on the Somerville Board of Education in violation of the Equal Protection Clause of the United States Constitution and the New Jersey Constitution. 45a.

The State filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The petitioner then filed a motion for summary judgment. Thereafter, the Somerville Board filed a cross-motion for summary judgment. 46a. On September 5, 2000, the district court issued an opinion declaring the representation statute unconstitutional as applied. 45a. The district court found that the statute denied Branchburg citizens the right to elect representatives to oversee the high school education of their children in violation of the one person, one vote principle. 45a. On May 22, 2001 and July 2, 2001, the district court entered interim remedial orders

increasing Branchburg's representation on the Somerville Board of Education. 30a and 26a. Pursuant to the court's May 22, 2001 Order, Branchburg has 6 members on the board in addition to Sommerville's 9 members. 40a.

Branchburg sought appellate review of the District Court's Orders of May 22, 2001 and July 2, 2001 limiting the interim relief to the addition of six members to the Somerville Board. The Commissioner of Education and Somerville cross-appealed the district court's orders of September 4, 2000, May 22, 2001 and July 2, 2001 granting Branchburg's summary judgment and instituting of the interim remedial plan. 8a.

On August 2, 2002, the Third Circuit Court of Appeals decided the companion case of English v. Board of Education of the Town of Boonton, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003).** In English, the Third Circuit reversed the district court and held that "valid geography-based restrictions on voting do not offend the principle of one person, one vote." English, supra, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 125 S .Ct. 852 (2003). The court further found that such restrictions are not subject to a strict scrutiny standard and must only bear some rational relationship to a legitimate state purpose. In reaching this conclusion, the Third Circuit Court of Appeals relied upon Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978) wherein this Court held that "a government unit may

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**The cases were not consolidated due to the "as applied" challenges in each case and the minor factual distinctions between the two districts. However, the Third Circuit considered the identical issue of whether the one person, one vote principle is applicable where one school district enters into a contract (the sending district) to send its high school students across geographic boundaries to another school district (the receiving district) for educational services for these students.

legitimately restrict the right to participate in its political process to those who reside within its borders." The Petitioner for Writ of Certiorari filed in English was denied on January 10, 2003. English, supra, 301 F. 3d 69, 72 (3d Cir. 2002), *cert. denied*, 125 S .Ct. 852 (2003).

On December 4, 2002, the Third Circuit Court of Appeals reversed the district court in Branchburg and held that although Branchburg had sought severance, this did " not counsel a different result than in English," and thus, the geography-based restrictions on voting in Branchburg did not offend the principle of one person, one vote. 23a. Petitioner had contended that the potentially permanent nature of the relationship in Branchburg rendered English and Holt inapplicable. However, this argument was not persuasive because, as noted by the Third Circuit, Holt, likewise had no potential to end its relationship and the control was even more onerous.*** As such, Holt was applicable and the one person, one vote principle of the Fourteenth Amendment was not offended. 23a.

The court below reasoned that the Somerville Board only exercises authority over Branchburg residents with regard to the Somerville High School. Branchburg is free to control the education of its children from K-8, and the reach of Somerville's powers over Branchburg is limited exclusively to the high school. 21a . Branchburg pays only the "actual cost" of tuition of high school students, which does not include the capital improvements for the school district. N.J.A.C. 6A:23-3.1. Further, as in English, the

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***This case involves a contractual relationship that is not unique, nor does it involve the right to tax as petitioner argues. The $4.8 million dollars imposed on Branchburg is a tuition payment for all students pursuant to a contractual agreement.

powers of the Somerville Board based on municipal boundaries which separate two clearly defined voting jurisdictions are not co-extensive. Therefore, the rational basis review was properly applied. 21a.

ARGUMENT

THE THIRD CIRCUIT PROPERLY APPLIED THE HOLT CASE

A. There Is No Conflict Between Holt And Branchburg, As They Both Involved A Recognition That Valid Geography- Based Restrictions On Voting Do Not Offend The Principle Of One Person, One Vote.

Petitioner seeks review of the Court of Appeals Opinion and Order of December 4, 2002, 301 F. 3d 69 (2002), pursuant to 28 U.S.C. Section 1254(l). Under this standard, however, certiorari may be granted where "a United States Court of Appeals is in conflict with prior Supreme Court decisions." First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968). As the discussion below demonstrates, petitioner has failed to demonstrate that there is any tension between prior Supreme Court precedent. Furthermore, there is no recurring question of exceptional importance pursuant to S.Ct. R.10.

In Holt v. City of Tuscaloosa, 439 U.S. 60 (1978), this Court expressly recognized geographical boundaries limit the application of the one person, one vote principle. The

decision in Holt addressed the constitutionality of an Alabama statute that subjected Holt, an unincorporated community on the outskirts of the city of Tuscaloosa to the city's police jurisdiction. Holt was subjected to Tuscaloosa's police and sanitary regulations and the primary jurisdiction of the Tuscaloosa court, as well as the city's power to license businesses, trades and professions. However, the statute did not entitle Holt residents to vote in Tuscaloosa's elections.

In concluding that the scheme in Holt did not violate the one person, one vote principle, this Court distinguished other cases, including Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970) on the grounds that those cases involved a denial of the voting franchise "to individuals who were physically residing within the geographic boundaries of the governmental entity concerned." Holt, supra, 439 U.S. at 68. See e.g. Baker v. Car, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Evans v. Corman, 398 U.S. 419 (1970); Little Thunder v. South Dakota, 518 F. 2d 1253 (8th Cir. 1975)(all involving a single voting jurisdiction). It is undisputed that the districts involved in the instant suit are two separate voting districts with their own separate governing bodies.

Since the Third Circuit properly determined that "valid geography-based restrictions on voting do not offend the principle of one person, one vote," it properly applied the rational basis test to the send-receive statute at issue in this case to determine its validity. Holt, supra, 439 U.S. 60 (1978). The court below properly applied this test to Branchburg residents who live outside of the boundaries of Somerville, have their own elected school board and voluntarily entered into a contract with Somerville to educate their high school students.

Petitioner contends that the Third Circuit's decision is inconsistent with the case of Holt v. City of Tuscaloosa, 439 U.S. 60, 99 S. Ct 383, 58 L. Ed 292 (1978). Petitioner's bases this argument on dicta in Holt which "seemed to recognize that in a situation in which a governmental body subjects non-residents to important aspects of state powers," strict scrutiny may apply. Petitioners's brief at p. 10. The Court in Holt did recognized that such powers as the power to tax may be subject to strict scrutiny if such the entity was exercising precisely the same governmental powers over residents of the surrounding territory as it does over those within the jurisdiction. Holt, supra, 439 U.S. at 72. The police powers in Holt are even more onerous as those found in this case. Furthermore, Somerville is not exercising the exact same power over the non-residents, who have their own school board and independently provide education to their K-8 students.

The Third Circuit rejected petitioner's contention that Holt is distinguishable because this case concerns education, a critical function. While recognizing that education is an important function of state and local government, the Third Circuit held that the extraterritorial power over education exercised by the Somerville Board is limited. Furthermore, education is not a fundamental right and is no more important or critical than the governmental powers being exercised in Holt -- police powers. In fact, the power exercised over high school students in Branchburg is significantly less onerous than the general police powers exercised in Holt.

The petitioner further contends that the decision in Holt has "spawned uncertainty" in our lower courts and among commentators. Petitioner's Brief at p. 17. The petitioner compares the case of Mixon v. Ohio, 193 F. 3d

389(6th Cir. 1999) to the district court decision below to support contention that there is uncertainty. However, the Third Circuit has clarified any uncertainty by its reversal of the district court in this case. Furthermore, the case of Mixon is entirely consistent with Holt and the Third Circuit decision below.

In Mixon v. Ohio, 193 F. 3d 389 (6th Cir. 1999). In Mixon, the issue of whether the one person, one vote principle applies to citizens outside of a jurisdiction was squarely addressed. In Mixon, citizens of the Cleveland School District challenged the constitutionality of an Ohio state statute which allowed the Mayor of Cleveland to appoint a new school board for the Cleveland School District. The plaintiff argued that the statute unconstitutionally caused voter disenfranchisement for residents in the Cleveland Park School District living in other parts of the city, because these residents did not vote for the mayor. The court, in finding no violation of the one person, one vote doctrine reasoned that "residence is a key element in determining whether legislation violates the one person, one vote doctrine." Mixon, supra, 193 F. 3d at 304. The Mixon court relied upon, and is entirely consistent with Holt. Likewise, the law review articles relied upon by petitioner do not suggest there is any conflict between Holt and other authorities.

Petitioner has relied upon dicta is several Supreme Court cases to support contention that strict scrutiny should apply to the treatment of one person, one vote in the context of education. See petitioner's brief at p. 11. Notwithstanding that all this support is dicta, the cases are not applicable to the instant case. The Third Circuit's decision is entirely consistent with Ball v. James, 451 U.S. 355 (1981) and Evans v. Cornman, 398 U.S. 419(1970). Although Ball recognized cases where strict scrutiny would

apply, this Court in Ball held that the one person, one vote principle was not offended by a restriction on voting in an election for director of an agricultural improvement and power district. Evans, supra, 389 U.S. at 372. This Court in Ball reasoned that the assessment did not create such general government authority as to involve the strict scrutiny standard. In Evans, this Court invoked the doctrine to protect the total denial of the right to vote to persons actually residing within the single jurisdiction. Again, both of the foregoing cases are entirely consist with this Court's holding in Holt and the decision of the Third Circuit Court of a Appeals below.

Under the rational relationship test, courts apply "a very deferential standard, under which a law will be sustained ... even if the law seems unwise or works to the disadvantage to a particular group, or if the rational for it seems tenuous." Romer v. Evans, 517 U.S. 620, 632 (1996). It is well settled that under this standard, states enjoy significant latitude in the design of local governments. English, supra, 301 F. 3d at 82.

The court in English specifically recognized that the complexity of financing and management of a statewide public school system mandates that "there will be more than one constitutionally permissible method of serving them within the limits of rationality." English, supra, 301 F. 3d at 82.(quoting Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)). However, the court below also noted that:

> the mere fact that the representation scheme might have been crafted with more precision...does not mean the current system is irrational, for this Court does not sit to determine whether [New Jersey] has chosen

> the soundest or most practical form of internal government possible.

English, supra, 301 F. 3d at 81.

In the instant case, the Third Circuit followed its decision in English wherein it found that, indeed, New Jersey has legitimate reasons for limiting the representation of a sending district in the receiving district's board's decision. English, supra, 301 F. 3d at 80. In following English, the court in Branchburg found that "the possibility of severance does not counsel a different result than English...." The court reasoned that in Holt, Tuscaloosa exerted its police and sanitary regulations and business licensing requirements over Holt, a small town located beyond Tuscaloosa's city limits... and there was no indication that Tuscaloosa's powers were limited in time or that Holt could take action to escape from Tuscaloosa's extraterritorial powers. Holt, 439 U.S. at 61-61. However, despite the seemingly permanent nature of Holt's situation, the Supreme Court held that it did not violate the one person, one vote principle of the Fourteenth Amendment. Id. at 68-70. Thus, even assuming the Branchburg situation may be permanent, which is still speculative in light of the fact that the last time severance was sought was 23 years ago, the general makeup of the populations may have changed since then and the Administrators of state government, including the Commissioner and the State Board of Education have since changed, there is no basis for applying the strict scrutiny standard to these facts.

As there is no tension or conflict between the cases of Branchburg and Holt, there is no basis to grant certiorari in this case. The Third Circuit Court of Appeals properly applied the case of Holt, to the facts in English and

Branchburg, which involved a single voting district. The Third Circuit held that the case of Holt was controlling, which involved a decision of this Court wherein the geographic limits on the one person, one vote principle was expressly adopted. The well reasoned opinion of the Third Circuit Court of Appeals below should not be disturbed.

B. There Is No Recurring Question Of Exceptional Importance In This Case.

Petitioner contends that certiorari is warranted because the Third Circuit's decision in this case will have "substantial practical and legal implications." Petitioner's Brief at p. 13. However, petitioner fails to demonstrate how the limited situation presented in Branchburg could have implications in any other district or in any other state. The petitioner predicates its argument on the fact that there are 215 send-receive relationships in New Jersey. The petitioner fails to provide any other data regarding the high school populations of any of these districts, or whether any of these districts have ever sought to sever the relationships.

The petitioner contends that this is exceptionally important because receiving districts efforts to amend the statute or extricate themselves from the relationship have failed. Petitioner's brief at p. 14. a petition for severance over twenty years ago. As stated previously, the populations of the two geographic jurisdictions may have changed and there is different Commissioner of Education and State Board of Education which would make a determination. We also have no idea what would take place during any appellate review. The petitioner also mistates the facts of English and states that "other sending districts have therefore sought to terminate their send-receive relationships in litigation." Petitioners brief at p. 14. The sending district school in English never sought to sever its relationship, it merely sought to increase representation on the receiving district's board of educations. This effort was unsuccessful. See English v. Board of Educ. of Boonton, 301 F. 3d. 69 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 852 (2003).

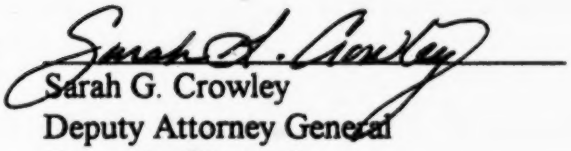
The remainder of the petitioner's argument on this point focuses not on the recurrence of such an issue, but rather repeats an earlier argument regarding the importance of education. However, the Third Circuit adequately addressed this issue its their decision finding that extraterritorial power over education exercised by Somerville is no more important or critical than the governmental powers being exercised in Holt. Thus, the decision below is not in conflict with any other Circuit or with this Court's opinions addressing one person one, one vote principle. Accordingly, there is no recurring question of exceptional importance and certiorari must be denied.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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